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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 74-1285

PAUL MULLER,

Petitioner,

—vs—

UNITED STATES STEEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The first question presented for review as drafted by Petitioner is rendered misleading by his attempt to incorrectly trade upon the term "constructive discharge", a term used by the Court of Appeals only because it was sponsored by Petitioner. Because Petitioner, the Trial Court and the Court of Appeals all used the term to mean a termination of employment caused by racial discrimination, we submit that the first question presented for review is more clearly stated as follows:

> 1. Whether an employee who has been unlawfully discriminated against with respect to *promotion* to a temporary supervisory position must establish a causal connection between such discrimination and his voluntary *termination* of employment before he can receive back pay to compensate him for such *termination*.

STATEMENT OF THE CASE

The Court of Appeals held that U.S. Steel had unlawfully discriminated against Muller in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) (1972) in failing to *promote* him to the temporary supervisory position of spell foreman, and *upheld* the award of back pay attributable to that unlawful failure to promote. However, the Court found that the facts in the record would not support a finding that Muller's *voluntary* termination of his employment was a *result* of *unlawful discrimination*, and so disallowed *that portion* of the back pay award attributable to his termination.

ARGUMENT

I.

THE FIRST QUESTION PRESENTED FOR REVIEW — THE BACK PAY AWARD

A. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE OPINION BELOW TURNS UPON THE FACTS OF THE CASE.

The portion of the award of back pay disallowed by the Tenth Circuit, which Petitioner here seeks to have reinstated, was not permitted because the losses for which the award was designed to compensate were not in fact caused by unlawful discrimination. In reversing the District Court's *finding*, the Court of Appeals noted that there was a "dearth of evidence" to show that Muller was constructively discharged. (Appendix to Muller's Petition, p. xiv).*

Because Petitioner is asking this Court to review the facts of this case to determine whether the discrimination caused Muller to resign, and because this fact question is of no consequence to litigants in other actions, the ruling below need not be reviewed by this Court.

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*That the term "constructive discharge" was used by the Court of Appeals to mean a termination of employment caused by racial discrimination is made clear by the Court's statement at page v of its opinion as appended to Muller's Petition. There the Tenth Circuit stated that the Trial Judge, the Hon. Willis W. Ritter, had

> found that Muller in addition had been constructively discharged from his job in that Muller's resignation was not a matter of free choice; that it *resulted from discrimination*. [Emphasis added]

It might be pointed out that the Court used the term "constructive discharge" only because it was used in the same fashion by the Trial Court at Para. 19 of its Conclusions of Law (R. 229) which in turn were adopted verbatim from the draft of Muller's attorney.

B. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE OPINION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS.

Those Circuit Courts of Appeals which have addressed the issue—the Fourth, Fifth, Seventh and Eighth and District of Columbia Circuits, as well as the Tenth Circuit—have all recognized that recovery of back pay under Title VII is dependent upon a finding that unlawful discrimination be the *cause* of the injury or loss complained of.

For example, the Fourth Circuit in *Robinson v. Lorillard Corp.*, 444 F.2d 791, 804, *cert. denied* 404 U.S. 1006 (1971), a Title VII race discrimination case, held that

> back pay is not a penalty imposed for moral turpitude; it is compensation for the tangible economic loss *resulting from* an unlawful employment practice. [Emphasis added]

In another racial discrimination case, *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), brought under Title VII and cited by Muller at page 10 of his Petition, the Fifth Circuit limited back pay to compensate for injury caused by unlawful discrimination. It stated at pages 252-53:

> Once a court has determined that a plaintiff or complaining class has sustained economic loss *from* a discriminatory employment practice, back pay should normally be awarded . . . .[Emphasis added]

The Seventh Circuit in *Bowe v. Colgate, Palmolive Co.*, 489 F.2d 896, 903 (7th Cir. 1973), cited and quoted by Muller at page 11 of his Petition, made clear its view that compensable loss must be caused by unlawful discrimination.

The Eighth Circuit in *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) found, inter alia, that there was discrimination in the employer's selection of foremen. While stating that back pay may be an appropriate means of relief, the court made no award. However, the court added in this connection at page 380 that employers and unions which had ample opportunity to remedy an unlawful employment practice

> should be put on notice that they will be held responsible for the economic losses accruing to the parties *injured by* such unlawful employment practices. [Emphasis added]

And finally in *Watkins v. Washington*, 472 F.2d 1373 (D.C. Cir. 1972), cited and quoted by Muller at page 12 of his Petition, the District of Columbia Circuit stated that a back pay award to those who had suffered loss by reason of not being promoted was proper. The court went on to note with approval at page 1375 that

> [i]mplicit in the District Court's conclusion that a back pay award was appropriate was a determination that advancement for non-white employees had been *impeded by* racial discrimination. . . . [Emphasis added]

Though contained in a District Court opinion, the discussion in *Gerstle v. Continental Airlines, Inc.*, 358 F. Supp. 545, 552 (D. Colo. 1973) states with more particularity the necessity of the

element of causation mentioned by the Circuits. In this action, alleging sex discrimination, the Court held that

> in order for the aggrieved party to succeed there must be demonstrated by the required burden of proof the fact that such discrimination practice or policy was the *cause* of the claimed injury. [Emphasis by the court]

The uniformity of the Circuits in this connection conforms with the general principle applicable in almost every type of action, that an aggrieved party may recover only if the unlawful conduct in fact caused the injury complained of.

By reason of the foregoing, it is clear that the opinion of the Tenth Circuit is not in conflict with the opinions of other Courts of Appeals and thus does not warrant the review of this Court.

C. THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE PETITIONER'S FIRST QUESTION DOES NOT INVOLVE AN IMPORTANT STATUTORY ISSUE.

It is Petitioner, not U.S. Steel, who is attempting to construe the back pay provision of Title VII, 42 U.S.C. §2000e-5(g) (1972), in a novel and tenuous fashion by claiming in effect that he should receive a back pay award to compensate him for loss not caused by racial discrimination.

If the factual element of causation were to be ignored in applying this provision, Petitioner would be permitted effectively to receive punitive or exemplary damages (for which he neither prayed nor offered proof at trial) as opposed to compensatory damages. Such an award is at odds with the language of 42 U.S.C. §2000e-5(g) (1972) and with the interpretation placed thereon by

the various Circuit Courts of Appeals. In *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971), the Court stated at page 804:

> [B]ack pay is *not a penalty* imposed as a sanction for moral turpitude; *it is compensation* for the tangible economic loss resulting from an unlawful employment practice. [Emphasis added]

The Sixth Circuit in *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973), similarly stated that the nature of relief available under Title VII is "compensatory as opposed to punitive." And the Fifth Circuit stated in this connection in *Pettway v. American Cast Iron Co.*, 494 F.2d 211 (5th Cir. 1974), at page 253:

> As expounded earlier the raison d'etre of a *back pay* award is to *compensate* victims of discrimination for economic loss, not to punish the discriminating employer or insure future compliance. [Emphasis added]

Clearly, the interpretation placed upon 42 U.S.C. §2000e-5(g) (1972) by Petitioner does not merit serious consideration and should not be regarded as an important statutory question requiring the review of this Court.

II.

THE SECOND QUESTION PRESENTED FOR REVIEW — THE AWARD OF ATTORNEYS' FEES

A. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE PETITION IS PREMATURE.

Muller's Petition that this Court review the sufficiency of the award of attorneys' fees is premature because the award has not yet been made. The Court of Appeals simply vacated the Trial Court's initial award of some Fourteen Thousand Dollars ($14,000) with directions that it be *reconsidered* by the Trial Court inasmuch as the damage award was reduced and the class-type injunctive relief vacated entirely. [Appendix to Muller's Petition, p. xvi].

Petitioner erroneously argues that the Tenth Circuit's action will discourage those who have been victimized by unlawful discrimination from bringing actions and from acting as private Attorneys General. His contention assumes, before the fact, that upon remand the Trial Court *will* award attorneys' fees in an amount that will in fact discourage others. At best, Petitioner's request that this Court intervene is premature.

B. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS WHICH HAVE ADDRESSED THE ISSUE THAT ATTORNEYS' FEES SHOULD BE AWARDED ONLY TO THE EXTENT THE PLAINTIFF PREVAILS.

The Court below ruled that the award of attorneys' fees be *reconsidered* by the trial court because Petitioner was reversed in part on appeal. This ruling is in conformity with the decisions of other Courts of Appeals that attorneys' fees be awarded under Title VII only *to the extent* plaintiff prevails.

For example, in the Title VII action of *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972), the Court stated at page 1008:

> The amount of the award [of attorneys' fees] should not be such that it would discourage others from seeking to attack discriminatory practices. *However, the amount of the award should be proportionate to the extent to which the plaintiff prevails in the suit.* We believe that the district court should reconsider the award of attorney's fees in light of our decision that the plaintiff is entitled to a small portion of the back pay claimed by her. [Emphasis added]

The Seventh Circuit followed the same rule in *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974) and *Batiste v. Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974). In *Williams*, a sex discrimination case brought under Title VII, the court stated at page 409 in connection with 42 U.S.C. §2000e-5(k) (1972), which permits the award of attorneys' fees, that:

> As a general guideline, the amount of an award of attorneys' fees should be proportionate *to the extent* to which the plaintiff prevails in the suit. [Emphasis added]

By reason of the foregoing, it is clear that the Tenth Circuit acted properly in directing the trial court to reconsider the award of atttorneys' fees. Accordingly, the action of the Court below does not warrant review by this Court.

We might add here that Petitioner's argument that the action of the Court of Appeals will discourage others from acting as private Attorneys General is without merit in any event. This is so because Petitioner did not properly act as a private Attorney General for the benefit of others.* He acted for himself only. He brought an individual action, as opposed to a class action, and did not seek injunctive relief for himself. Accordingly, the Court of Appeals properly vacated the class-type injunctive relief awarded by the Trial Court. (Appendix to Muller's Petition, p. xv).

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*All cases cited by Petitioner which discuss plaintiff's role as a private Attorney General and all similar cases reviewed by U.S. Steel are actions brought for injuctive relief for the benefit of others similarly situated to plaintiff. *E.g., Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

CONCLUSION

By reason of the foregoing arguments and authorities, it is clear that the action of the Court of Appeals in reducing the award of back pay and in vacating for reconsideration on remand the award of attorneys' fees does not present the kind of questions having importance to anyone other than the parties to this litigation. We, therefore, respectfully suggest that the questions presented for review by Petitioner need not be reviewed by this Court, and that accordingly the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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